1987

Franchot Olson v. Clearfield City : Petition for Writ of Certiorari

Utah Supreme Court

Steven Vanderlinden; Attorney for Respondent.
Franchot L. Olson; pro se.

IN THE SUPREME COURT OF THE STATE OF UTAH

870315

FRANCHOT OLSON,

Petitioner,

vs.

CLEARFIELD CITY,

Respondent.

870315

Case No. ~~860374~~

Priority No. _____

PETITION FOR WRIT OF CERTIORARI
FOR REVIEW OF DECISION BY COURT OF APPEALS
AFFIRMING AND REVERSING THE FINAL ADMINISTRATIVE
DECISION OF THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

FRANCHOT L. OLSON
In Propria Persona
Petitioner
145 North Fourth West
Logan, Utah 84321
Telephone: (801) 753-0214

Steve Vanderlinden
Clearfield City Attorney
Attorney for Respondent
140 East Center Street
Clearfield, Utah 84015
Telephone: (801) 776-0940

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANCHOT OLSON, Petitioner, vs. CLEARFIELD CITY, Respondent.	:	Case No. 860374 Priority No. _____

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145 North Fourth West
Logan, Utah 84321
Telephone: (801) 753-0214

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Clearfield City Attorney
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CONSTITUTION CITED

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE NATURE OF THE CASE

Appeal from the Ruling on Appeal made by Douglas L Cornaby, District Judge presiding, in the District Court of the Second Judicial District in and for the County of Davis, State of Utah; and Petition for Writ of Certiorari from the Ruling on Appeal in the Utah Court of Appeals in and for the State of Utah.

DISPOSITION IN THE COURT BELOW

The court below affirmed the verdict and judgment of the trial court. The Utah Court of Appeals affirmed the verdict and judgment of the trial court, to-wit: The District Court of the Second Judicial District in and for the County of Davis, State of Utah.

RELIEF SOUGHT ON APPEAL

Reversal of conviction and restoration of costs.

STATEMENT OF THE FACTS

The officers in this case each gave different opinions as to the strength of the odor of alcohol on the petitioner's breath during the interrogation/arrest stages of this case in that Sergeant Kennepohl, the first officer to contact the petitioner, said that he finally got a fairly strong odor when the petitioner had opened the trunk of his vehicle (T-23), while Officer Slater said it was a medium odor (T-52) and

Officer Schilling stated it was a faint odor - and he was close to the petitioner and was the same height (T-88).

Petitioner Olson was deprived of his liberty on the morning of October 13, 1985, at approximately 2:00 a.m., when Sergeant David Kennepohl took him into custody and turned him over to Officer Randy Slater for interrogation pertaining to the accusation of Driving Under the Influence of Alcohol (T-24).

Petitioner Olson was interrogated without the right to counsel, and the evidence collected and testimony obtained was used against him to obtain a conviction the crime of Driving While Under the Influence of Intoxicating Liquor and Drugs, in violation of 41-6-44 of the Clearfield City Code, a Class B misdemeanor. That at the time and place aforesaid (on October 13, 1985, in the City of Clearfield, County of Davis, State of Utah), the petitioner did operate and/or have actual physical control of a motor vehicle within this State while under the influence of alcohol and/or drugs, to a degree which rendered the defendant incapable of safely driving said vehicle (T-7) (Information and Verdict).

Petitioner Olson was first observed by Sergeant David Kennepohl at approximate 1:50 a.m., while Kennepohl was Northbound at 1500 South in Clearfield, Davis County, Utah (T-16).

Sergeant Kennepohl was on SR-126, the main highway that runs from Layton to Sunset through Clearfield, Utah (T-26).

The posted speed is 45 miles per hour (T-16,17). The road conditions were dry (T-16).

Sergeant Kennepohl stated that he first observed the Olson vehicle when it pulled off the right-hand side of the road going Southbound on a four-lane highway (T-16). He then stated that the Olson vehicle made a "U" turn and headed Northbound from about 1150 South; he stated that as he began to catch up, the Olson vehicle accelerated (T-17, T-27).

Kennepohl stated he could not say for sure whether the Olson vehicle came to a complete stop (T-17). He also stated that Mr. Olson, upon completing the "U" turn, went from the outside lane to the inside lane (T-17). He also stated that Mr. Olson was riding the yellow line with his left rear wheel (T-17). Sergeant Kennepohl said he observed the left rear wheel over the yellow line from a distance of two or three blocks some distance back (T-18). He stated that the lines were clear (T-18). He said he actually observed the wheel over the yellow line in certain places (T-18). He also stated that there were no street lights where the "U" turn was made (T-19).

Sergeant Kennepohl said he started to catch up to Mr. Olson at 200 South because Mr. Olson had stopped for a red light (T-19). Sergeant Kennepohl stated that as he approached Mr. Olson at 200 South, the light turned green and Mr. Olson accelerated at a high rate of speed, and that as he went through 300 North, he was doing 60 miles per hour and Mr. Olson was going even faster and was still pulling away from him (T-19). Sergeant Kennepohl then said that he

turned on his overhead lights while going 60 miles per hour in downtown Clearfield, Utah, with light traffic, and did not turn his siren on for an additional two blocks at 500 North, and that Mr. Olson came to a full stop at 650 North where he had stopped at a red light at the intersection (T-19, T-20). Sergeant Kennepohl said he was never able to get close enough to the Olson vehicle to pace it (T-19).

Sergeant Kennepohl asked him for his drivers license (T-21). He told Kennepohl it was in the trunk (T-22). Mr. Olson went to the trunk, opened it with a key, looked in the trunk, and then said that the bag was not there (T-22, T-35). Kennepohl said he did not notice whether he had more than one key or if he had shut off the ignition and removed the key from the car (T-35).

Kennepohl said at the time Mr. Olson was at the trunk, he smelled a fairly strong odor of alcoholic beverage on his breath (T-23) and noticed that his eyes were a little glassy (T-23).

Kennepohl said Mr. Olson was coherent (T-23). Kennepohl asked for a registration, and Mr. Olson got in the car to find it (T-23, T-24).

Sergeant Kennepohl turned the scene over to Officer Slater and told him it was a good possibility (T-25).

Sergeant Kennepohl said he notified Officer Slater that he was following a possible DUI when he was at 700 South (T-30). Sergeant Kennepohl said that the only thing

that made him think that he had a possible DUI was the increased speed and the riding of the yellow line (T-30).

Officer Slater was the designated DUI investigation officer for the Clearfield City Police Department (T-42) but had received no advanced training (T-42, T-74, T-75). Officer Slater asked Mr. Olson to perform certain actions which included oral statements to be made by Mr. Olson in response to questions and instructions given by Officer Slater before he was told he had a right to counsel or that he could not be compelled to give evidence against himself during custodial interrogation by Officer Slater. Officer Slater requested Mr. Olson to perform and answer questions or make statements during the performance (T-45).

Officer Slater told Mr. Olson his license would be taken from him if he took the chemical test (T-75). Officer Slater also told him it would be taken away if he refused to take the chemical test (T-69, T-70, T-71).

Officer Slater told Mr. Olson he would like him to submit to a chemical test, and Mr. Olson agreed to take the test (T-54).

Officer Slater put handcuffs on Mr. Olson and put him in his patrol car (T-50).

On October 13, 1985, Mr. Olson was released on bail. On October 18, 1985, Mr. Olson was arraigned before the Honorable Alfred C. Van Wagenen, Clearfield Circuit Court Judge, on charges of DUI, Speeding, and No License

in Possession, to which Mr. Olson plead "not guilty" to all of the charges.

The trial was held on January 23, 1986, where Mr. Olson was convicted of the single charge of Driving While Under the Influence of Intoxicating Liquors and/or Drugs, in violation of 41-6-44 of the Clearfield City Code.

Mr. Olson appealed his conviction to the Second District Court, but his attorney would not help him do so. He hired a new attorney, and he also refused to attend oral arguments and left Mr. Olson without counsel at a critical stage of his appeal.

Mr. Olson applied for an extension of time in which to obtain new counsel, but his motion was denied by District Judge Douglas L Cornaby on April 17, 1986, and the oral arguments were held without counsel present for Mr. Olson.

On May 30, 1986, Judge Cornaby entered a Ruling on Appeal affirming the judgment and verdict of the trial court and returned the file to the Clearfield Department of the Fourth Circuit Court with instructions to execute the sentence.

Mr. Olson informed the Clearfield Circuit Court that he was making an appeal to the Supreme Court of Utah, and he then tiled a Notice of Appeal with the Davis County District Court and delivered a copy of it to the Clearfield Circuit Court; he was told by Circuit Court Judge Van Wagenen that he did not have anymore rights to appeal and that the sentence would be executed.

Mr. Olson is raising the same issues on appeal in the Supreme Court that he raised in the District Court. They concern the denial of due process of law, denial of counsel at critical stages of the case, and being compelled to give evidence against himself in the absence of counsel, including oral or verbal statements, and was forced to file his own appeal because counsel refused to help him, prejudice by the trial court judge in regard to his refusal to plea bargain to a lesser charge of Reckless Driving, evidence should have been excluded that was included which prejudiced the jury, and essentially compelled the defendant to testify against himself by means of a surreptitious recording while he was interrogated while under arrest, and denied the benefit of counsel. The jury was composed of a juror who could be challenged for impartiality because of a death in his family caused by a drunk driver.

The surreptitious recording was only partially introduced as testimony of the defendant and prejudiced the jury. Petitioner was denied access to the trial tapes and, in particular, he could not review the Police Department's surreptitious tape in preparing for his appeals herein because it was transmitted with the record but was sealed.

SUMMARY OF ARGUMENTS

Petitioner Olson was deprived of his Constitutional rights to counsel, trial by an impartial jury, from

being compelled to give evidence against himself in the absence of counsel, and his evidence so taken was used against him to convict him of a crime he did not commit, by use of unlawful and un-Constitutional means.

The petitioner has a right to counsel under the provisions of both the Constitution of the United States and the Constitution of the State of Utah, and such counsel was denied at critical times and stages of his in-custody/under arrest interrogation, and virtually all of the evidence presented against the petitioner was obtained from his own mouth while in such custody, and he was not allowed to have counsel before making the decision to have to submit to a chemical test in a situation where he was told by the interrogating officer that if he took the test, he would lose his license and if he refused to take the test, he would lose his license, and it was based on the fact that he was threatened with the loss of his license based on either decision he made and that he was not allowed to have counsel before making the decision, and before he was given his rights under the Miranda rule. Even after he said he would not answer questions without an attorney present or give evidence against himself, he was denied his rights to remain silent and have the assistance of counsel in making that critical decision. He was convicted before trial regardless of what choice he made.

ARGUMENT

POINT 1

THE TRIAL COURT AND DISTRICT COURT BOTH COMMITTED ERROR BY RULING THAT EVIDENCE REGARDING APPELLANT'S GIVING EVIDENCE AGAINST HIMSELF IN ABSENCE OF COUNSEL WAS ADMISSIBLE WHEN HE HAD NOT BEEN ALLOWED COUNSEL BEFORE OR AFTER HE WARNED OF HIS RIGHTS. THE EVIDENCE SHOULD HAVE BEEN EXCLUDED. THE UTAH COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Article I, Section 12, of the Constitution of the State of Utah provides that no person shall be deprived of life, liberty, or property without due process of law. The petitioner was so deprived of his liberty without due process of law and was held to answer for a crime without his right to counsel being present at every critical stage of the prosecution. The Utah Supreme Court ruled in Hunter v. Dorius, 23 Utah 2d 122, 458 P.2d 877 (1969) as follows:

> Driver was held not to have refused to submit to test where he was informed of his rights and the consequences of his refusal at 9:48 o'clock but could not reach his attorney until shortly after 10 o'clock at which time he consented, but by then the police officer refused to perform the test.

Further, along this line the Kansas Court of Appeals ruled in State v. Bristor, 682 P.2d 122 (Kan. Ct. App. 1984) as follows:

> The administration of a blood alcohol test is a "critical stage" in the prosecution of a DUI case and the defendant must have the opportunity

> to consult with an attorney as to whether to take the test or not. However, the right to counsel is a limited right. The defendant cannot be allowed to abuse the right in a manner which would unduly delay or unreasonably interfere with the administration of the test.

In the Sites v. State case, 481 A.2d 192 (Md. Ct. App. 1984), the court ruled as follows:

> Chemical test is a "critical stage" and defendant is entitled to consult with an attorney before deciding whether or not to submit to a chemical test as long as such attempted communication will not interfere with the timely administration of the test.

POINT II

THE RESPONDENT, CLEARFIELD CITY, IS CLEARLY IN DEFAULT IN THE FOLLOWING REGARDS:

1. They did not appear for oral arguments.

2. They did not file a Plaintiff-Respondent's Brief.

POINT III

ONE MALE MEMBER OF THE JURY AT THE CLEARFIELD CIRCUIT COURT STATED HE HAD A MEMBER OF HIS FAMILY KILLED BY A DRUNK DRIVER. THE PETITIONER IS ENTITLED TO AN IMPARTIAL JURY.

POINT IV

THE ARRESTING OFFICER TESTIFIED AT THE TRIAL UNFACTUAL STATEMENTS AS FOLLOWS:

1. That he saw the rear tire of the vehicle over the line on the highway from a distance of approximately three blocks to a quarter of a mile from the petitioner's vehicle, which is impossible.

2. That the petitioner was speeding from where the officer said he first saw petitioner to where officer stopped him. If the officer was going 65 miles per hour, as he stated and the petitioner was going the speed limit, they would have come together where the officer stopped the petitioner.

3. That there was a well lighted area, with a street light on each corner, where the field sobriety test was administered.

CONCLUSION

The petitioner in this case was deprived of his Constitutional right to due process of law under both the Utah and the United States Constitution and was put in the untenable position of being compelled to be a witness against himself and to give evidence against himself without first having the benefit of counsel and was not given equal protection of the law and was deprived of his liberty by persons acting in violation of the Constitution of the United States and of the Constitution of the State of Utah, and compelled evidence from him and denied him counsel at critical stages of the prosecution and also by a judge in the appeal of the case so that the petitioner was left to his own imagination and devices in order to perfect his appeal to the Supreme Court of the State of Utah. The conviction should be reversed, and the petitioner should be compensated for his fine and time in which he was deprived of his liberty.

The petitioner hereby respectfully requests that this Court grant him a one-year extension of time within which to perfect a proper Brief and within which to demand a responsive Brief from the respondent herein, and for the further reason that petitioner intends to properly present the following facts in said Brief:

1. Being denied equal protection of the law.

2. Illegal reading of my Miranda card rights.

3. Failure of Officer Von Collins to appear in court for testimony.

4. Violation of my Sixth Amendment rights, due to inadequate, incompetent, and unethical counsel.

5. Illegal sentencing.

6. Judge was prejudice.

7. Juror was prejudice.

8. Fact tape that was obtained into evidence should have been totally excluded or totally admitted.

9. No access to tape before trial.

10. Field test Officer Slater used to determine I was driving under the influence has no scientific validity.

11. Question qualification Officer Schilling has in giving mystagmas test.

12. Before Officer Slater asked petitioner to take mystagmas test, he did not inform petitioner he had the right to remain silent and the right not to incriminate himself, and the right to an attorney before petitioner answered any questions.

13. Implied consent law which is civil in nature and separate from criminal charges.

14. Denied request that the testimony regarding questions beyond Officer Slater asking petitioner to take mystagmas test be restricted.

15. Officer Slater did not advise petitioner depending on his performance in the tests that he may be allowed to drive away from the scene.

16. Tape was taken without petitioner's knowledge surreptiously, and that poses an unfair advantage. Petitioner clearly, from the very beginning, asked for an attorney to be present. Officer Slater subsequently asked petitioner if he was going to answer questions even after the officer had been fully advised that petitioner did not intend to answer any questions without an attorney.

17. Judge reason for allowing tape as evidence for the reason that the officer did not continue in any way to ask questions. Tape should have been excluded. Officer Slatter did continue to ask questions about the DUI.

18. Officer Slater refused to get petitioner's medication after arrest that petitioner took daily. Officer Slater put petitioner in a life threatening situation. This medication was in the petitioner's car, and he informed Officer Slater of same. He was disabled with a bad heart and needed three medications each day. Officer was informed that petitioner was sick at that time and needed his medication and Cepotacal mouthwash was in the front seat of petitioner's car.

19. Petitioner was totally cooperative until point after arrest and Officer Slater had refused to get petitioner his three medications that he took daily, which medications were in petitioner's car with his name and the Veterans Hospital written on the label.

20. The Davis County Jail refused to seek medical attention or let the petitioner see a doctor, and he was held over 18 hours without a phone call permitted him for five hours.

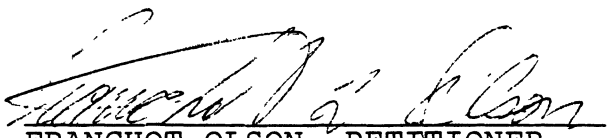
21. Officer Kennepohl was without observing any reason to assume petitioner was driving under the influence or anything of that sort and not to assume petitioner drunk, and should have not involved seven officers to involve him.

22. Prosecution burden proving beyong a reasonable doubt had a blood alcohol content of .08 percent or greater by weight. Prosecution had no proof beyond a reasonable doubt.

23. On impound, why was not all medication and alcohol impounded as evidence?

24. Officer Slater stated unfactual statements under oath numerous times during trial.

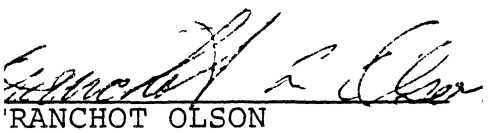
Respectfully submitted this 4th day of September, 1987.



FRANCHOT OLSON, PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered the following on this 4th day of September, 1987: Four copies of the foregoing Petition for Writ of Certiorari (with one bearing my original signature) to STEVE VANDERLINDEN, Clearfield City Attorney, attorney for respondent, 140 East Center Street, Clearfield, Utah; and ten copies of the said Petition for Writ of Certiorari (with one bearing my original signature) to the Utah Supreme Court Clerk's Office, State Capitol Building, Salt Lake City, Utah.



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IN THE UTAH COURT OF APPEALS

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Clearfield City,	)	
	)	
Plaintiff and Respondent,	)	
	)	MEMORANDUM DECISION
v.	)	(Not for Publication)
	)	
Franchot Olson,	)	Case No. 860290-CA
	)	
Defendant and Appellant.	)	

Before Judges Billings, Davidson and Garff.

PER CURIAM:

Appellant Franchot Olson appeals his conviction of driving while intoxicated, in violation of a Clearfield City Ordinance. His appeal was submitted to the Court on appellant's brief only because respondent failed to file a brief. R. Utah Ct. App. 26(c) and 29(c).

Appellant argues that he was compelled to give evidence against himself by taking field sobriety tests without his attorney being present, in derogation of his rights under the fifth and sixth amendments of the U.S. Constitution. We have examined this contention and consider it to be wholly without merit. Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983); cf. American Fork City v. Crosgrove, 701 P.2d 1069 (Utah 1985); Caveness v. Cox, 598 P.2d 349, 354 (Utah 1979); see also, South Dakota v. Neville, 459 U.S. 553 (1983); Schmerber v. California, 384 U.S. 757 (1966). Nor was the admission of his refusal to submit to alcohol breath test a violation of defendant's right against self incrimination. Sandy City v. Larson, 51 Utah Adv. Rep. 21 (1987).

We have also considered the other contentions that are suggested in appellant's brief, but are not properly argued, and find each one equally without merit.

The conviction is affirmed.

ALL CONCUR:

_____
Judith M. Billings, Judge

_____
Richard C. Davidson, Judge

_____
R. W. Garff, Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION by depositing the same in the United States mail, postage prepaid to the following:

Franchot L. Olson
145 North 4th West
Logan, UT 84321

Steve Vanderlinden
Clearfield City Attorney's Office
133 South State
Clearfield, UT 84015

Honorable Douglas Cornaby
District Court Judge
City and County Building
Farmington, UT 84025

DATED this 5th day of August, 1987.

Karen Bean
Case Management Clerk